

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

-----x 16-CR-614 (AMD)

3 UNITED STATES OF AMERICA,

4 Plaintiff,

United States Courthouse
Brooklyn, New York

5 -against-

December 11, 2018
10:30 a.m.

6 DAN ZHONG,

7 Defendant.

8 -----x

9 TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
10 BEFORE THE HONORABLE ANNE DONNELLY
UNITED STATES DISTRICT JUDGE

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1 (In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Hi. Everybody can have a seat.

4 THE COURTROOM DEPUTY: This is criminal cause for a
5 status conference, Docket Number 16-CR-614, U.S.A. versus Dan
6 Zhong.

7 Counsel, state your appearance, government first.

8 MR. SOLOMON: Good morning, Your Honor. Alexander
9 Solomon, Ian Richardson, Craig Heeren and Douglas Pravda for
10 the government.

11 THE COURT: Hi. Good morning.

12 MR. CLEARY: Good morning, Your Honor. Robert
13 Cleary for Mr. Zhong. Mr. Zhong is present in court with an
14 interpreter. And also appearing with me are Dietrich Snell
15 and Brittany Benavidez for the defense.

16 THE COURT: Hi.

17 All right. So I know this is not news to everybody,
18 but Judge Irizarry asked me to take over this case, which I'm
19 happy to do. And I'm pretty sure -- I know I've seen a couple
20 of the AUSAs before, but I don't think that I've ever had any
21 trials with any of the members of the defense. So I guess
22 today what we'll talk about is the schedule for the trial.

23 I did receive last night some long submissions.

24 Maybe there are judges in this world that like getting those
25 the night before a conference, I'm not one of them. So I hope

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1 we won't have too much more of that.

2 I have taken a look at them. To the extent that
3 you're going to seek to reargue decisions that Judge Irizarry
4 has made already, I've reviewed everything that she's done so
5 far and I'm not inclined to go back. I think we should really
6 go forward.

7 I will take a closer look at what was submitted last
8 night, and I'll let the government know if I need a response.
9 But it seems to me it's just asking me to revisit what she
10 already decided.

11 Am I right about that?

12 MR. CLEARY: It is, Your Honor.

13 Just to be clear, we weren't expecting to deal with
14 it today. We had a two-week window within which to file, and
15 that's the only reason we filed.

16 THE COURT: No, no, I know. I thought we had such
17 smooth sailing going on here. It's fine.

18 I will take a look at it, but as I said, I don't
19 think that's the best use of everybody's time to ask me to
20 revisit what Judge Irizarry already took quite a bit of time
21 in deciding, and those decisions look quite sensible to me.

22 I know there's also an open motion to dismiss, and I
23 just wondered if that was still your intention to file that
24 motion, given the fact that we're not going to have a January
25 trial date.

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1 MR. CLEARY: Yes, Your Honor. So we filed that as
2 quickly as we could, on the 27th, which happened to be the day
3 the case was assigned to Your Honor.

4 THE COURT: Right.

5 MR. CLEARY: It's based on a late production of
6 *Brady* material, which we had just gotten, so we got the late
7 *Brady* material --

8 THE COURT: I'm sorry, can you use the mic.

9 You know what, Mr. Cleary, you can just stay seated,
10 if you want. I think it's just so much easier for everybody
11 to use the microphone. So just start from the beginning.

12 Is that helpful for the interpreter?

13 Oh, you know, wait one second.

14 Did you not swear the interpreter in?

15 THE COURTROOM DEPUTY: No.

16 THE COURT: Oh, right, sorry about that.

17 I'm reminded that we need to swear in the
18 interpreter, which I was thinking of as I walked in and
19 promptly forgot about. Go ahead.

20 (Whereupon, JOHN LAU was sworn as interpreter.)

21 THE INTERPRETER: Yes, I do.

22 THE COURTROOM DEPUTY: Please put your name on the
23 record.

24 THE INTERPRETER: John Lau, L-A-U.

25 THE COURT: Is everybody fine with not starting all

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1 over again?

2 MR. CLEARY: Yes, Your Honor.

3 THE COURT: Mr. Cleary, if you could just start with
4 what you were saying about that motion.

5 MR. CLEARY: Sure.

6 We would still like to litigate the motion, Your
7 Honor, even recognizing the Court is going to adjourn the
8 trial, because part of it relates to the timing that you're
9 addressing now, which is getting the information in time where
10 we would not be able to use it for an early-dated trial.

11 But the other part of it is, and I don't want to be
12 pejorative here so I'm going to be as polite as possible, is
13 that in seeking bail, in seeking detention in 2016 and again
14 in 2017, the government made representations to the Court that
15 are, we believe, completely inconsistent with that *Brady*
16 material.

17 We didn't have it. They didn't give it to us. The
18 Court didn't have it, and that's the key part of what the due
19 process violation is in the motion to dismiss.

20 THE COURT: Okay. I'm going to confess, I haven't
21 read it very carefully.

22 My question was really, is there any part of it that
23 will be not -- that doesn't apply any more because we're going
24 to have a later trial date? I just rather only have to decide
25 the things I really have to decide.

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1 MR. CLEARY: It would apply for, A, that reason;
2 and, B, the other reason, there's two interrelated problems
3 we're dealing with here, is we have a defendant who's in jail
4 and has been in jail for two years.

5 THE COURT: In other words -- I'm interrupting
6 because I don't want to litigate it now.

7 MR. CLEARY: Yes. No. No.

8 THE COURT: The whole thing is the government's
9 going to have to answer the whole thing.

10 MR. CLEARY: I believe so, Your Honor.

11 THE COURT: So how long is it going to take you to
12 respond to that motion?

13 MR. SOLOMON: I could respond this Friday.

14 THE COURT: Sure. So that is that.

15 THE COURTROOM DEPUTY: The 14th.

16 THE COURT: On the 14th. Yes. All right.

17 Now, there are a couple of open matters.

18 I have a couple of questions about this Rule 15
19 motion. Because I mean it's a little bit unusual, at least in
20 the context of the cases that I've seen, that the witnesses --
21 and just correct me if I'm wrong about this -- but the people
22 that we're talking about are two categories. There's a group
23 of people that were identified as victims by the government.

24 Correct so far?

25 MR. CLEARY: That's correct.

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1 THE COURT: And then there are two others, like an
2 HR person and somebody who actually was deposed, but the
3 defense didn't participate.

4 Also correct?

5 MR. CLEARY: Kind of.

6 THE COURT: Close enough?

7 MR. CLEARY: Close enough for present purposes.

8 THE COURT: So let's deal, first of all, with the --
9 let me just ask first of all: Can you all agree on anything
10 here? Because I -- let me just say a couple of things about
11 it.

12 First, in my view, if you can agree about these
13 witnesses, that's good. I don't think, and maybe I'm putting
14 the cart before the horse here, I don't think it's acceptable
15 to have one side by Skype and one side in person. I mean I
16 just don't think that's a workable situation. So that to me
17 is not a solution.

18 But here's my question. Let's just deal with that
19 category of people who are characterized as victims.

20 Are there six of them; is that right?

21 MR. CLEARY: Nine, Your Honor.

22 THE COURT: Nine of them.

23 So I just want to make sure I understand what the
24 materiality piece is. Is it because they'll say we weren't
25 enslaved, essentially?

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1 MR. CLEARY: Correct. And they're designated as
2 victims by the government, and they'll deny that.

3 THE COURT: Okay. But so -- I mean do you have a
4 response to whether that's material? I mean presumably you
5 could bring in a whole bunch of people who said I wasn't
6 victimized, but that -- I mean that's like bringing in if
7 somebody's charged with robbing a bank and you bring in other
8 people in other banks who they say that they didn't rob our
9 bank. I'm not quite sure I see the materiality.

10 MR. CLEARY: Your Honor, I will address that.

11 I think the analogy is if the government were to
12 charge five bank robberies and there are alibi witnesses for
13 the defendant for each of the five robberies, each one of
14 those alibi witnesses is relevant and material to the defense.

15 The same thing is true here. Because the
16 government's position is if they force labor, threatened or
17 used any single one of these 53 witnesses who -- 53 victims
18 that they've identified, they would argue, and I think they'd
19 be correct about this, that that suffices for purposes of the
20 statute.

21 Now, we're never going to be able to depose 53
22 witnesses, but to the extent we could depose a large number of
23 them, nine in the instance we're talking about and they say I
24 wasn't victimized, I came voluntarily to the United States and
25 I don't know anyone else that was victimized, and I lived in

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1 the same house with a number of those people, that to us is
2 highly relevant and highly exculpatory.

3 THE COURT: I have to say, I haven't decided it,
4 but -- go ahead, what do you have to say about it.

5 MR. SOLOMON: I think the defense and the government
6 take different views as to what's material. The thrust of our
7 prosecution is based on debt bondage contracts.

8 Yes, there were instances early on in the
9 conspiracy, in the charged conspiracy, when someone escaped,
10 rendition squads were sent out to that person, but the thrust
11 of the prosecution here is whether these individuals, the
12 victims, were forced to pledge as collateral significant
13 assets in order to be allowed to travel to the United States
14 to work.

15 What's unclear from Mr. Cleary's submissions is
16 whether these witnesses will say, yes, we're not subject to
17 the debt bondage contracts. Whether they were locked up, or
18 whether they were, you know, operating at gun point, that's
19 not something we're going to be arguing at trial. So I don't
20 think he meets the materiality threshold.

21 MR. CLEARY: Your Honor, they've charged that, they
22 charged in Charge One and Count Two of the indictment physical
23 restraint. So that's a charge that we have to deal with,
24 number one.

25 Number two, each of these witnesses, and the nine

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1 I've interviewed, all of them, they will say they were not
2 debt bonded, that they all entered into employment contracts
3 voluntarily that had benefits for them, and they came over to
4 the United States under those contracts. And some of them
5 came several times. They were willingly here.

6 THE COURT: Well, then my next question is: You
7 know, obviously, if they're beyond the subpoena power but
8 there's an unusual feature, at least in my view in this case,
9 that -- and if I'm wrong about this I'm sure I'll hear about
10 it -- but aren't they employees of the defendant's company?

11 MR. CLEARY: It's not the defendant's company, Your
12 Honor. A number of them, and maybe even the majority or most
13 of them, are employees of a different company called China
14 Rilin that's owned by the -- I believe it's owned by the -- my
15 client's uncle.

16 THE COURT: I see. So, and at least at one point
17 the company -- and, again, correct me if I'm wrong -- but at
18 one point didn't the company say that it would make them
19 available and would fire them if they didn't come?

20 MR. CLEARY: I don't know. I don't think that's the
21 case, Your Honor, I wasn't involved in those.

22 But company counsel is in the courtroom, so they can
23 answer that question.

24 THE COURT: I'm sure I read that somewhere. Did I?

25 MR. SOLOMON: That's correct, Your Honor.

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1 THE COURT: So I guess my question is, I don't
2 understand -- I know they say they don't want to come back to
3 the United States because they're afraid of being prosecuted;
4 is that right?

5 MR. CLEARY: I haven't spoken to them about this,
6 Your Honor. That's my understanding. They are concerned
7 about being prosecuted or put in jail.

8 THE COURT: For what?

9 MR. CLEARY: I'm not entirely sure.

10 All I spoke to them about was the foundation for the
11 Rule 15, which is whether they would come to testify in the
12 United States, and they said they would not do that.

13 And then company counsel, their own individual
14 counsel, talked to them about the issues Your Honor is
15 raising.

16 THE COURT: I mean but the government has promised
17 what? That you'll give them safe passage and you won't -- I
18 mean, obviously if they were to do something criminal here, I
19 mean if they robbed a bank while they were here.

20 But assuming you promise that you're not going to
21 prosecute them for anything in connection with this case or
22 anything, right?

23 MR. SOLOMON: That would be correct, Your Honor.

24 THE COURT: I don't understand why that's not
25 enough, particularly -- I mean this is not the usual case,

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1 because they seem, at least in my uneducated view, to have
2 some connection to the defendant. He at least -- there's
3 somebody that has some measure of control over them.

4 MR. CLEARY: That's not true, Your Honor. Most of
5 them, most of this nine do not know the defendant at all.

6 THE COURT: They worked for his uncle.

7 MR. CLEARY: Right. But, again, different company
8 in a different country.

9 And they told us they don't -- there may be one or
10 two exceptions to this, but in the main, they don't know him.
11 They don't know my client.

12 THE COURT: That's not quite the point I was making.

13 It seems to me that it's just somewhat unusual in
14 the context of these cases to have the witnesses working for
15 someone who is certainly connected to the defendant and who
16 previously, apparently, were willing to be here.

17 So I'm not making a decision today. I will say
18 then -- the only thing I will say about those other two
19 witnesses, I think I'm unlikely to grant the Rule 15 on those.

20 I've got everybody's submissions. I think I
21 understand everybody's arguments. But the HR person, as I
22 read it, seems to be prepared to testify that everybody loved
23 coming over to the United States or something along those
24 lines. I don't really see that that's material.

25 MR. CLEARY: Well, what he could testify to is the

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1 process for selecting people to come, and the main point --
2 there are several subsidiary points, but the main point there
3 is there were a lot of people willing and anxious to come over
4 for these jobs in the United States. So -- and only a few
5 were selected for it. And he'll describe that process.

6 And that, too, seems to us to be exculpatory.

7 THE COURT: Okay. And then there's the other one
8 who looks like there was the opportunity to depose him. I
9 think the defense passed on that. I don't know if that was
10 you or whatever.

11 MR. CLEARY: It wasn't me. I don't think he's that
12 other one. There is another one who is a worker --

13 THE COURT: Oh, that's right.

14 MR. CLEARY: -- who is not denominated as a victim.

15 THE COURT: Yes. Okay.

16 Well, as I say, I'm not going to rule on that today.

17 I would encourage you to try to reach some
18 accommodation on this because, you know, if the government is
19 willing to make all these concessions, and that was the proper
20 reason, as I understood, they were afraid of something
21 being -- you know, prosecuted here.

22 If that's not going to happen, that removes the
23 concern, and they ought to be able to get here as witnesses.

24 So if you can work that out, you can work it out, otherwise --
25 and just let me know, so -- as much as I love drafting all

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1 kinds of opinions, if there's one I don't have to, you'll let
2 me know about that.

3 Let me just briefly address some of these other open
4 discovery questions.

5 All right, well, I think I have to -- I will let you
6 know about that on -- all right, so there were four -- I hope
7 I have this right -- four categories of documents that the
8 defense wants to compel.

9 The first category is these unredacted versions of
10 documents that relate to the forced labor charge.

11 This is another thing I'm going to ask you to work
12 together on, to turn over information about witnesses that
13 won't pose safety concerns. The one that sort of I was
14 thinking of was the law enforcement officers who participated
15 in some of the searches.

16 Is it your position that that poses a safety
17 concern?

18 MR. SOLOMON: It's not a safety concern. We
19 intended to disclose that information to the extent we're
20 relying on reports made by these witnesses referencing these
21 witnesses at the time of 3500 disclosures.

22 THE COURT: All right.

23 MR. CLEARY: I'm sorry, Your Honor, on that, that
24 would only be for the witnesses, agent witnesses they're
25 calling. We think we're entitled to it for all the agents,

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1 because we may want to call a couple of the agents in our
2 case.

3 THE COURT: You don't have any problem with giving
4 them the names of law enforcement people who were there; do
5 you?

6 MR. SOLOMON: No.

7 THE COURT: Okay. So that solves that.

8 MR. CLEARY: And will that be done now, Your Honor,
9 as opposed to waiting to the time of 3500?

10 THE COURT: I'm going to let you guys work that out.

11 I guess I'll jump to this now. Obviously, you know,
12 I'm not in a position to try this case in January, so I was --
13 so the date that -- I'll come back to these, but let me just
14 make sure that we can be kind of on the same page.

15 Is it correct that you're about a two-week trial?
16 Two weeks for your witnesses?

17 MR. SOLOMON: It could be a little longer. The
18 difficulty with this trial is a number of the witnesses will
19 be testifying in Chinese or Chinese-language documents, so the
20 pace of the trial will be slower than typical.

21 THE COURT: Do you have any idea of how many
22 witnesses you might call?

23 MR. SOLOMON: Most of the witnesses are quite short.
24 I think there are probably six or seven longer witnesses.

25 THE COURT: Okay.

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1 MR. SOLOMON: And then probably 20 or 30 shorter
2 witnesses.

3 THE COURT: Okay. And I don't want to pin you down
4 by this, but have you thought about to the extent to which you
5 will put on a case?

6 MR. CLEARY: We certainly plan on it, Your Honor,
7 and that goes for the depositions or to encourage people to
8 come here. That group, so that's eleven or nine, depending on
9 how you're counting.

10 And then there's the *Brady* that just got produced.
11 And if you want, I can hand up a piece of it so you can just
12 see the sort of testimony --

13 THE COURT: No, I'm a simple person. One thing at a
14 time.

15 MR. CLEARY: If we get access to those witnesses,
16 those, too, are highly exculpatory, people designated as
17 victims saying I was not subjected to force or threat, that
18 would if -- the big "if," I don't know if we can get ahold of
19 those people, but I assume they are all in China, that would
20 add a few more witnesses to our list.

21 THE COURT: So what are we talking?

22 Should we set aside four weeks for this trial?

23 MR. SOLOMON: To be on the conservative side, I
24 think, Your Honor.

25 THE COURT: Okay. Of course, no one will object if

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1 it's shorter than that.

2 MR. SOLOMON: Of course.

3 THE COURT: I think at the end of February,

4 February 25th is a good day for us.

5 How does that work for you all?

6 MR. SOLOMON: It's wonderful.

7 THE COURT: Is that okay for you, Mr. Cleary?

8 MR. CLEARY: It's fine, Your Honor.

9 THE COURT: Good. Then I'm going to move on it
10 quickly.

11 MR. CLEARY: If I can just squeeze in one other
12 comment.

13 The only thing I'm concerned about -- I mean it's
14 fine in the sense that we've been trying to get to trial for a
15 long time --

16 THE COURT: That's what I hear.

17 MR. CLEARY: -- as you might imagine.

18 I'm concerned about this new material that was just
19 produced. There's no way that we're going to be able to use
20 that in a meaningful way between now and the end of February.
21 It's just not possible.

22 If my assumption is right, and I think it is, that
23 all of the people reflected in this *Brady* material are in
24 China. It's just going to take us time to find them, and I
25 can tell you the steps that we have to. That's the problem.

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1 But I'm betwixt and between, because I don't want to have
2 Mr. Zhong sitting in jail any longer than necessary.

3 THE COURT: Well, the only reason I'm asking is
4 because I know this will shock you, but this is not my only
5 case, and so I need to set aside a period of time.

6 I mean do you have anything -- I know he keeps
7 referring to -- counsel keeps refer to it as "*Brady*
8 materials". Is there something that you want to say about
9 that?

10 MR. SOLOMON: Sure.

11 THE COURT: I don't want to look at it now.

12 MR. SOLOMON: Obviously we are not ready to argue
13 the motion right now, but our view is that the materials are
14 not *Brady*. I think, as you'll see in the briefing that we
15 filed on Friday, before 2011, February of 2011, the
16 defendant's company had a practice of keeping workers
17 confined. This practice stopped after there were several
18 housing inspections performed on premises in which the
19 defendant's company maintained workers. After that point,
20 workers were more or less free to come and go within the
21 facilities, but they were still debt bonded.

22 So the fact that in 2016 a number of these witnesses
23 were interviewed and they indicated that they were not subject
24 to forced confinement or the threat of physical violence is
25 not *Brady*.

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1 Most of these people indicated that they were, in
2 fact, subject to debt bondage contracts. Almost all of them
3 indicated that their passports had been forfeited to Rilin, so
4 Rilin kept their passports. One of them indicated that that
5 practice was done to prevent the workers from fleeing.

6 And, finally, almost all the workers indicated that
7 they were hoping to go back to China immediately, or they were
8 planning to go back to China immediately. In fact, they
9 traveled back to China a few days later where they were
10 expecting one payment for the full performance for the past
11 months or past several years.

12 So our view is that is not --

13 THE COURT: I didn't let Mr. Cleary argue his
14 position, and I should have cut you off a little earlier.

15 I promise I'm going to read it. I'm just really
16 trying to get an idea of our schedule.

17 So let me ask you this, Mr. Cleary: Let's say that
18 you come in second on the *Brady* material question. Is
19 February a reasonable -- February 25th reasonable?

20 MR. CLEARY: When you say "come in second," you mean
21 the Court finds it's not exculpatory?

22 THE COURT: Yes.

23 MR. CLEARY: Can I have one second to confer?

24 THE COURT: Yes.

25 (Pause.)

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1 MR. CLEARY: That would be fine, assuming we get the
2 Rule 15 depositions or the live testimony.

3 THE COURT: If you don't come in second on that one,
4 right.

5 I'm going to -- I don't have their response yet, and
6 as I said I have not read your submissions because I wanted to
7 have both of them, so I mean that might change things.

8 But let's put that as a placeholder, that
9 February 25th, and if something changes, we'll all be
10 flexible.

11 Let me just get back to -- just before I forget,
12 these other categories of discovery of the motion to compel.
13 One of them would be the communications between the Department
14 of State and the DOJ about the investigation.

15 My view is that the defense has the diplomatic note,
16 which seems to establish what it is that the defense wants to
17 establish. So unless there's *Brady* material in there, I'm
18 going to deny that motion to compel.

19 The additional visa applications about the 53
20 people, I think that one might be moot. I think the
21 government has said that they can't find any additional
22 documents.

23 Am I right about that?

24 MR. SOLOMON: That's correct.

25 THE COURT: All right. And then is there -- oh,

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1 there's -- let me just ask my clerk a question here.

2 (Pause.)

3 THE COURT: The limits of my computer knowledge are
4 so glaringly obvious.

5 So the other question was about the ESI sources.

6 I don't think the government is obligated to produce
7 that kind of information. So that is denied.

8 I think we've covered all of those things.

9 I'll just say a couple of things. You know, every
10 judge is different on how they handle things. We tend to take
11 a low-drama approach to everything here. I think it works
12 better.

13 You know, for purposes of trial, I usually let the
14 parties try their cases. I'm not a big sidebar person, but
15 I'll have them if I think it's necessary.

16 In terms of objections and things, I've made my
17 ruling and we move on. I might be wrong, it's happened
18 before, but I don't tend to go back and revisit those things.

19 I mean I'm not -- at least I think I'm not
20 unreasonable, but I think if we keep going and rehashing old
21 things, we'll be on trial for four months instead of four
22 weeks. So that's kind of the way we roll here. But we'll
23 find out.

24 So I'm going to get your response on Friday.

25 MR. SOLOMON: Right.

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1 THE COURT: And we'll decide it as quickly as we
2 can.

3 And you're going to see what you can work out about
4 the Rule 15 things and you're going to let me know. And I
5 think that's it.

6 MR. CLEARY: And I guess, Your Honor, we would reply
7 to their response, right?

8 THE COURT: Oh, right, yes, sorry.

9 So how much time do you need to reply?

10 Will I be deciding this on Christmas?

11 MR. CLEARY: Let me count that.

12 Will the 21st be bad?

13 THE COURT: We're a 24-hour-a day operation.

14 (Pause.)

15 THE COURT: Are there going to be any more CIPA
16 motions?

17 MR. SOLOMON: No, Your Honor.

18 THE COURT: Okay, good.

19 So you're going to answer on the 21st.

20 Okay. And we'll work hard to get you a decision.
21 Okay?

22 MR. SOLOMON: Just one final note, Your Honor. We
23 need to exclude time.

24 THE COURT: Yes, indeed.

25 The time will be excluded, in the interest of

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1 justice, while we resolve all these motions.

2 I don't think anybody's objecting to that.

3 MR. SOLOMON: Right. In fact, I think we had to the
4 two weeks since the defense filed their motion to dismiss, and
5 so would we ask that time be excluded since the filing of that
6 motion.

7 THE COURT: Do you remember when that was?

8 MR. CLEARY: The 27th.

9 THE COURT: Okay. So it's excluded from then on.

10 Okay?

11 MR. SOLOMON: Thank you, Your Honor.

12 THE COURT: All right, anything else?

13 MR. SOLOMON: No. Thank you.

14 THE COURT: See you soon.

15 MR. CLEARY: Thank you, Your Honor.

16 THE COURT: Thank you.

17

18 (Whereupon, the matter was concluded.)

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22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

24 s/ Linda D. Danelczyk

December 12, 2018

25 LINDA D. DANELCZYK

DATE